regulation and price, let alone that California rates would be $13.36 per month.[103] In addition, no source is given for subscriber levels, nor is any basis provided for the assumption that penetration levels would be uniform across markets despite varying price levels.

In the end, Hausman's conclusion that "econometric analysis demonstrates that regulation is the most important single factor explaining high cellular prices in California," is highly questionable[104] because his analysis does not seriously consider any other explanation. His study arbitrarily excludes smaller markets when there are ways to control for differences between small and large markets within the model. This decision to base economic control variables on only a small fraction of the relevant market dilutes their possible explanatory power. And, considering only three control variables, even though they have little correlation to price when other logical factors, such as population density and age of market, are readily available, similarly makes Hausman's conclusions seriously questionable.

In a separate affidavit prepared for the Cellular Telephone Industry Association ("CTIA") Hausman makes the further claim that state regulation is not only associated with higher rates, but also with lower penetration rates. In addition, he asserts that the cellular industry has a price elasticity of -0.4 to -0.5 which indicates that the industry cannot be behaving as a

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103. AirTouch, Appendix E at 6.

104. AirTouch, Appendix E at 3.

monopoly. Hausman bases these conclusions on three sets of econometric analysis: (1) a study on 1994 prices identical to the one prepared for AirTouch, discussed above; (2) a similar price study for 1989 to 1993 and (3) a study of penetration levels.

At the outset, it bears emphasis that CTIA refused to provide the CPUC with the pricing and subscriber data it used to develop this analysis. Without this data, the CPUC has no knowledge regarding what data was reviewed, what data was excluded, or whether and to what extent the data was adjusted or otherwise manipulated. Not having access to the data Hausman used for his econometric study prohibits the CPUC from verifying the results of the study or assessing the study's accurateness. In particular, without access to previous years' price studies we cannot be sure whether they include the same severe defects of the AirTouch study, including a mistaken definition of the relevant market, erroneous price data, and reliance on inconsistent definitions of regulation. In addition, Hausman's penetration study may or may not have included the correct population. For instance, if subscriber data is for a carrier's entire market, but population is only for a fraction of this market, as in the case of the AirTouch pricing study, then the entire analysis of penetration is highly suspect.

In short, without access to the data, the CPUC simply could not do the thorough analysis of Hausman's econometric study. For this reason, the CPUC has moved to strike Mr. Hausman's

affidavit and testimony appended to and discussed in CTIA's opposition.[105]

Notwithstanding CTIA's unreasonable denial of access to data, the CPUC was able to identify obvious and significant flaws concerning the design of Hausman's analysis which make the results dubious. First, Hausman's penetration study is based on an inadequate measure of price. According to Hausman, a consumer's decision to acquire cellular service is based only on the monthly air time and access charges for a 160 minute consumer. The study ignores other elements of price which would enter into a consumer's decision, such as phone price, activation fee, and initial "free" minutes as part of a promotion. By looking only at the relatively stable monthly charges, Hausman completely overlooks the aspects of price which change more widely and which form the basis of cellular carriers' marketing efforts.

Hausman's price elasticity estimate is also seriously flawed because it ignores a key measure of cellular service consumption: usage. As Hausman himself argues in his critique of the DOJ's pricing analysis, "Cellular users pay two charges in their bill:

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105. Motion by California to Strike Affidavit and Testimony of Jerry A. Hausman Appended to and Discussed in the Opposition of CTIA, dated October 7, 1994. CTIA provided no lawful basis, nor is there any, for withholding this information from the CPUC. As a matter of fairness and due process, the CPUC has a legitimate interest and legal right to review and respond to all information reviewed or relied upon by those in opposition to the CPUC petition. Home Box Office, Inc. v. FCC, 567 F. 2d 9, 54 (D.C. Cir.), Cert. denied, 434 U.S. 829 (1977). Accordingly, the FCC must strike from this record Hausman's affidavit and testimony in support of CTIA.

access and usage."[106] By considering access only and not usage, Hausman commits what he himself considers a "fundamental and elementary mistake." [107] To be sure, determining price elasticity of demand for cellular service would be a difficult endeavor; however, a price elasticity study must take usage into account. In addition, Hausman's cross-sectional study does not indicate how consumers within a market will respond to price changes. Owen, on behalf of McCaw, compounds Hausman's fundamental error of omitting usage by relying on Hausman's questionable elasticity estimates, then concluding that cellular industry price elasticity of demand demonstrates that cellular prices have not been at monopoly levels.[108] That conclusion is equally dubious.

In sum, Hausman's study, and by extension Owen's, are fraught with obvious and serious errors which the CPUC was able to identify even without access to the underlying data. Such fundamental errors raise significant questions of whether other major errors were committed, and thus cast considerable doubt on Hausman's conclusions.

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106. AirTouch, Appendix E at 13.

107. Id. at 12.

108. McCaw, Owen at 28.

2. Parallel Pricing of Cellular Service Is Evidence of Market Power

In our petition, the CPUC observed a pattern of parallel pricing between cellular carriers in major California markets. This phenomenon, when combined with other factors, is consistent with a non-competitive market. Petition at 40-45. CCAC nevertheless contends that prices are not similar for discount plans in the Los Angeles area; that contention is belied by the facts.[109] See CPUC Petition, App. J. Tariffs for LACTC and LASMSA show nearly identical discount plans which were filed within two days of each other. Moreover, the minimum airtime commitment, fixed monthly charge, monthly access charge, and charge for additional airtime are identical for all six plans.

We find the two day separation between the filings for approval of these plans interesting in light of the carriers' assertions that the CPUC's tariff filing process is anti-competitive because it allows competitors to mimic each others' rates. We find it hard to believe that a company could develop several new plans and obtain corporate approval in a two-day period, and suggest that this is further evidence that the two carriers are tacitly aware of each other's pricing strategies.

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109. CCAC, Appendix B at 20.

3. The Carriers Fail to Account for Productivity Gains When Touting Declines In Cellular Prices

Charles River Associates challenges the CPUC's analyses of prices by arguing that cellular basic service rates have declined in real terms since 1989. It further argues that had the CPUC taken into account service quality improvements, cellular rates would have declined even more.[110] The CPUC does not dispute these points. However, Charles River Associates' analysis is incomplete because it fails to take into account productivity gains. Both the CPUC and the FCC have included a productivity factor in calculating price caps for wireline carriers, which measures the efficiency gains that a company makes in the production of its goods or services. By omitting this consideration, the carriers understate the amount of price reductions which would be expected in a competitive market.

In California, for the local telephone companies, the CPUC has targeted productivity at 4.5 percent. A similar productivity factor of 4.5 percent for cellular services would be an extremely conservative assumption, since one would expect productivity gains for cellular services to be greater than for wireline telephone services, given the decline in cellular equipment costs' learning and the completion of primary build-out of cell sites. Applying this very conservative productivity factor in a truly competitive cellular market would have produced price

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110. CCAC, Charles River Associates at 12.

reductions even lower for basic service than are evident today. Thus, notwithstanding that certain cellular prices may have declined, such prices have remained substantially higher than expected in a fully competitive market.

G. High Prices and Excess Earnings Cannot Be Explained by Capacity Constraints

The CPUC petition argues that excess earnings cannot be explained by capacity constraints. The duopoly carriers nonetheless raise a host of non-issues concerning the CPUC's method for measuring capacity utilization and state irrelevant truisms concerning cellular capacity. However, their characterization of California's cellular markets actually supports rather than refutes our contention that cellular carriers do not face capacity constraints.

Specifically, Owen for McCaw and Charles River Associates for CCAC raise non-issues concerning the CPUC's measurement of capacity utilization rate ("CUR"). Owen contends that we confused economic capacity and physical capacity and that any conclusions we made concerning efficient use of capacity based on physical CUR are suspect.[111] Owen implies that physical CUR understates economic CUR. CCAC argues that we neglect the fact that what appears to be excess capacity may be necessary to ensure high quality.[112]

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111. McCaw, Owen at 33-34.

112. CCAC, Charles River Associates at 31.

None of these criticisms are valid because our study relied on the carriers' responses to CPUC data requests to define the necessary capacity to provide high quality service efficiently. Specifically, our study was based on the carriers' own notion of "Maximum Designed Capacity." Carriers undoubtedly consider efficiency and quality when designing their systems and responded to our survey accordingly. We did not impose an arbitrary measure of the appropriate level of capacity, but relied entirely on the carriers' expert judgment.

CCAC recites a number of truisms concerning capacity, but these do not in any way conflict with our analysis. First, CCAC maintains that capacity is lumpy so that, "additions to capacity are most efficiently made in discrete amounts, cellular carriers will often be observed with what appears to be excess capacity."[113] Second, CCAC contends that firms in capital intensive industries, such as the cellular industry, do not adjust prices to eliminate excess capacity at every point in time in deference to consumers' preference for stable prices.[114] CCAC's truisms suggest that cellular carriers may need some excess capacity; at the same time, Charles River Associates actually undermines the notion that cellular prices are determined by severe capacity constraints.

In short, the duopoly carriers' general characterization of California's cellular markets -- with falling prices and

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113. CCAC, Charles River Associates at 29.

114. Id. at 30.

increasing use -- suggest that cellular carriers do not face capacity constraints. They instead suggest that spectrum is not scarce and is getting less so with technical advances that allow greater use of available spectrum.

Carriers argue that customer growth is evidence of reasonable rates and competition,[115] when this is not necessarily true. Even a monopolist will consider lowering prices to expand market when costs are declining.

Finally, Owen attempts to associate the CPUC with an economic theory it never endorses, and then proceeds to ineffectively discredit this theory. Owen oddly claims that the CPUC "relies" on the Cournot theory of duopoly because we cite an FCC report which employs this model.[116] At no point does the CPUC petition endorse, let alone "rely" on the Cournot model. What prompted this desperate attempt by McCaw to associate our petition with Cournot and drag the CPUC into an arcane theoretical debate? Apparently it is Owen's desire to introduce an alternative economic model, the Bertrand model, which will predict that duopolies will charge the competitive price. In defense of the FCC's use of the Cournot model,[117] leading economists in the field of industrial organization suggest that

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115. McCaw, Owen at 36.

116.CCAC, Own at 18-19.

117. "Changing Channels: Voluntary Reallocation of UHF Television Spectrum," FCC OPP Working Paper Series, 1992, at 82.

it, or contemporary versions of it, are relevant.[118] It is clear that Owen was wrong in asserting that our petition "relies" on the Cournot model and it appears that he was mistaken in arguing that the FCC report's reliance on this model was without theoretical support.

H. Cellular Markets Are Not Yet Adequately Competitive In Order To Ensure Just and Reasonable Rates For Cellular Services In California

In sum, the duopoly cellular carriers' attempt to dismiss or explain away substantial evidence that cellular markets in California are not yet sufficiently competitive to ensure just and reasonable rates for California's consumers of cellular services must be rejected. The accumulation of all the evidence, and the analysis of such evidence in accordance with well-established methodology for examining the competitiveness of markets, lead to the inescapable conclusion that the markets for cellular services in California not yet competitive.

III. **LACK OF COMPETITION, NOT CPUC REGULATION, IS RESPONSIBLE FOR HIGH EARNINGS AND HIGH CELLULAR PRICES ENJOYED BY THE DUOPOLY CELLULAR CARRIERS IN CALIFORNIA**

The fundamental issue in this proceeding is whether conditions within discrete California markets are adequately

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118. Jean Tirole, Theory of Industrial Organization, 1990, at 210-211; Carl Shapiro, "Theories of Oligopoly Behavior" in Handbook of Industrial Organization: Volume 1 Schmalensee and Willig eds., 1989, at 351-352.

competitive to ensure just and reasonable rates to cellular services used by California residential and business consumers. The CPUC has shown with substantial evidence that such conditions are not currently adequate, and hence continued regulatory oversight is necessary to protect California consumers of cellular carrier rates for the near term. To circumvent this showing, the carriers attempt to shift the focus away from the fundamental issue before the FCC by collaterally attacking CPUC oversight of their industry. Both the carriers' attempt to dodge the CPUC findings of non-competitiveness and their attack on CPUC regulation must be rejected.

A. The Carriers Improperly Attempt to Distort CPUC Orders Governing Cellular Carriers

In general, the carriers have a long litany of complaints about the CPUC's regulatory program. While this may be the first time the FCC is hearing formally from the carriers, it is only an escalation their ongoing dissatisfaction and resistance with any regulatory oversight by the CPUC. The carriers' complaints in their oppositions to the CPUC's petition generally fall into the following categories:

- The CPUC has not allowed bundling of equipment and rates.
- The CPUC has not provided sufficient pricing flexibility.
- The CPUC's regulatory program is inconsistent.

None of these complaints has merit. As we will show below, the carriers have consistently resisted our efforts to implement

the policies and programs about which they now complain. The CPUC's concern has always been to ensure Californians the best possible service at lowest price; while the carriers may be concerned about quality service, their actions do not indicate that they are truly concerned with bringing down prices.

B. Bundling Is Prohibited Under California Law

The carriers complain that they are not allowed to bundle equipment and service in California. The CPUC considered the question of bundling in 1989. In D.89-07-019, the CPUC considered whether a special rate offered on one product, conditional on the purchase of a tariffed product, constitutes an indirect and unlawful discount on the tariffed product. Our finding in that decision was that discounting a package of regulated, tariffed services or products and unregulated, untariffed services or products (i.e., equipment) represents an indirect discount on the tariffed services.

The findings in D.89-07-019 were based on state law, which prohibits the type of activities in which the carriers were engaging. Specifically, California Public Utilities ("P.U.") Code § 532 prohibits utilities from offering utility services at rates or with terms and conditions other than those posted in their applicable tariffs. P.U. Code § 702 requires utilities to assure that their agents comply with CPUC orders, rules, and directions. Given these state legislative mandates, it is unlawful for utilities or their agents to make discounts on cellular equipment contingent upon the purchase of cellular service. No bill has been introduced in the California

legislature or sponsored by the cellular industry to change these statutory provisions.[119]

Moreover, the CPUC is in the process of revisiting its policy on bundling. Public Utilities Code § 532 says that the CPUC may "...by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable...." The case was submitted in docket I.88-11-040, after hearings and briefings, on August 22, 1994. The Administrative Law Judge's proposed decision is expected by the end of this year.

In the meantime, the only aspect of bundling in which carriers are not able to engage is combining equipment (which is untariffed) with service. It is unlawful to offer gifts with retail value greater than $25 (D.89-07-019, D.90-10-047, D.92-02-076, D.94-04-043). Carriers, however, take full advantage of the flexibility present currently, which, as noted above, is under review. For example, Appendix G includes a recent advertisement for Cellular One (Bay Area Cellular Telephone Company) that includes free incoming calls until 1995 and a $300 service credit over six months if the new subscriber buys a digital phone.

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119. We also note that the federal policy on bundling is relatively recent; the FCC only issued its order on bundling in 1992.

C. The CPUC Regulatory Program Has Served the Public Interest

The carriers complain that the CPUC's regulatory program is not in the public interest. This is not the case. The CPUC's regulation has been and is aimed at reducing costs for consumers of cellular telephone service. The duopoly carriers have resisted the CPUC's efforts to enhance competition as we tracked developments in the cellular market.

The carriers have been particularly displeased with several tenets of our program. They dislike the fact that the CPUC has once again ordered the unbundling of wholesale rates in D.94-08-022. The CPUC supports this separation because it creates additional opportunities for competitors to enter the retail market, and decreases the carriers' ability to exercise market power. The duopoly carriers have opposed this concept all along; it comes as no surprise that they are trying to litigate this issue yet again before the FCC.

The carriers also repeatedly complain that the CPUC is engaging in cost-of-service regulation. Yet since its inception in 1984, the cellular industry has never been subject to cost-of-service regulation in California.[120] The carriers

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120. The CPUC has repeatedly stated that we have no interest in cost-of-service for the cellular industry. When we adopted separation of wholesale and retail rates in D.90-06-025, we rejected cost-of-service regulation, concluding, "In sum, we find that rate of return regulation would be neither efficient nor

(Footnote continues on next page)

somehow confuse the separation of wholesale rates, with cost-of-service regulation.

CCAC continues to misunderstand and misconstrue our regulatory program when it states that the CPUC intends to continue to regulate cellular rates after viable alternative services enter the market. The CPUC made it patently clear in both our August 1994 decision[121] and our petition that we only request authority to continue our rate regulation for another 18 months, "during which time the CPUC expects to see the deployment and availability of cellular service from new competitive entrants which will allow market forces to substitute for regulation in ensuring just and reasonable rates...." Petition at 83.

CCAC further criticizes the CPUC for encouraging the development of a resale market for cellular service. CCAC at 84. This is not surprising, because resellers are the only real competition the duopoly carriers face currently. The carriers understandably dislike the requirement in D.94-08-022 that

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(Footnote continued from previous page)

workable for cellular carriers" (slip op. at 16). In D.94-08-022, we conclude "Cost of service regulation should not be pursued as a regulatory option for facilities-based carriers" (Conclusion of Law 8, slip op. at 95).

121. D.94-08-022, slip op. at 5.

resellers be allowed to interconnect with facilities-based carriers using their own, reseller switches, allowing resellers potentially to break down part of the current bottleneck and compete with the duopoly carriers on a broader scale.

In addition, the duopoly carriers have never liked the idea of a capacity monitoring program, originally adopted in D.90-06-025. We therefore find it hard to understand why they now complain about the fact that we have not implemented such a program. In response to petitions for rehearing by the carriers, we ruled in D.93-05-069 that we would reconsider whether implementation of the capacity monitoring program, along with unbundling of the wholesale tariff, is appropriate. This is scheduled to occur in the next phase of our ongoing investigation, I.93-12-007.

D. The CPUC Advice Letter Process Preserves The Due Process Rights of Interested Parties Without Unduly Burdening Those Who Invoke It

The duopoly carriers have long been unhappy with the CPUC's statutorily-mandated advice letter process, which requires utilities to request authority from the CPUC for proposed changes in their tariffs and provides an opportunity for interested parties to protest proposed actions. This streamlined and routine process, which applies to all regulated utilities in California, assists the CPUC's consumer protection program. It also provides the CPUC with a mechanism to check anti-competitive behavior by utilities by allowing affected parties to protest

planned actions and allowing staff to confirm compliance with CPUC policy.[122]

The duopoly cellular carriers point out that when their advice letters are protested, it is usually by cellular resellers. It is not at all surprising that the carriers should be upset about complaints from the resellers, the only competition the duopoly carriers face, and then only on the retail level. In our research on the advice letter process and the carriers' complaints with it, we had difficulty locating instances where the duopoly carriers used the process to protest proposed actions by another duopolist.[123] In contrast, we found that the duopoly carriers have no problem protesting proposed actions either by cellular resellers or non-cellular providers -- i.e., those that could competitively threaten the cellular carriers. For example, many of the companies that oppose the CPUC's instant petition recently filed protests to applications from landline providers Pacific Bell and GTE to establish

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122. The advice letter process for cellular carriers has been streamlined over the past four years. In April 1993, the CPUC gave carriers much greater flexibility when it allowed advice letters to become effective the same day they are filed. D.94-04-043.

123. The only example we could find is LACTC Advice Letter No. 107, which was protested by LASMSA because it would have allowed LACTC sales representatives to give new customers gift certificates as a rebate against service, which the CPUC found to be in violation of P.U. Code § 453.

cellular interconnection tariffs.[124] The CPUC ordered the landline providers to establish these tariffs as part of the CPUC's ongoing efforts to open "bottleneck" facilities. We mention the duopoly carriers' protests only to show the FCC that the carriers take advantage of the CPUC's regulatory process when they are on the offensive.

The cellular carriers also try to discredit the advice letter process by claiming that no complaints have been filed against them by consumers.[125] Again, the carriers are overstating the case. While formal complaint cases have rarely been brought by consumers against cellular carriers, the CPUC's Consumer Affairs Branch receives hundreds of informal complaints each year.

E. AirTouch Misrepresents The Denial Of Sacramento Valley Limited Partnership's Application For Rate Increase

As an example of the carriers' distortion of CPUC regulation, we point to the treatment of Sacramento Valley Limited Partnership ("SVLP"). AirTouch is correct only when it says that the CPUC denied SVLP's application for rate increase AirTouch at pp. 68-69. The reasons set forth in D.94-04-044, which AirTouch ignores, were stated clearly:

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124. Protests by LACTC, BACTC, US West and McCaw to Wireless Interconection Tariffs of GTE and Pacific Bell, filed in I.93-04-002/R.93-94-003, dated September 27, 1994.

125. LACTC at 14.

- Only SVLP and the Cellular Resellers Association were parties to the Settlement Agreement discussions; retail customers were not adequately represented.

- The requested ex parte treatment of the Settlement Agreement did not allow the CPUC to examine the merits of proposed increases in retail and roamer rates.

- The application itself was deficient in several areas.

AirTouch criticizes the CPUC for creating "arbitrary" standards of review in D.94-04-044. The CPUC's rejection of the SVLP application is explained in the decision, and is based on the company's inadequate justification of why it needs a rate increase:

> We find it logically incompatible that SVLP seeks the market protection of a regulated utility yet refuses to acknowledge its obligation to satisfy the same standard of evidence that such a regulated utility must meet as the quid pro quo for its protected franchise. The return earned by SVLP partners on invested capital is a function of billed revenues, operating expenses, depreciation, taxes, and invested capital used in serving customers. Absent a justification of these revenue and cost elements underlying applicant's claims, we have no way of testing or verifying whether or to what extent an earnings deficiency exists which would justify a rate increase. (D.94-04-044, p. 18)

The CPUC invited SVLP to either amend the Settlement Agreement or reinstitute the schedule for discovery and evidentiary hearings on its application, and suggested that doing so within 30 days of D.94-04-044 would expedite the process. SVLP chose neither option, deciding instead to file an

application for rehearing, which is pending before the CPUC. SVLP should not be allowed now to try its case at the FCC.

In the end, the carriers' attack of CPUC regulation is meritless. It is nothing more than a smoke screen to mask the fact that cellular markets in California are not currently competitive.

IV. THE CPUC ACTED IN FULL ACCORD WITH ALL APPLICABLE LAW

Having failed to undermine the CPUC's analysis that cellular markets within California are not currently competitive, and having failed to undermine the CPUC's findings of non-competitiveness with their own flawed analyses, the cellular carriers attempt to erect procedural roadblocks to defeat the CPUC petition. They claim that the Budget Act locks the CPUC into seeking to retain the particular set of state regulations in place well over a year ago. They claim that, short of mirroring the federal regulatory scheme for interstate commercial mobile services, the CPUC has no discretion to adopt any other regulatory scheme. They claim that, even if the CPUC has discretion to revise its regulatory scheme to foster competitive alternatives to the duopoly cellular providers, the scheme adopted by the CPUC lacks specificity and is procedurally defective.

Not one of these claims has any merit. Once again, they are simply a smoke screen behind which these non-competitive carriers attempt to hide.

A. Congress Unambiguously Intended That States Could Petition To Retain Existing State Authority Over Wireless Service Rates

The duopoly carriers assert that under the Budget Act, Congress intended that a state could petition to retain authority only over the precise set of regulations in place as of June 1, 1993. The carriers thus suggest that Congress intended to deny states any flexibility in exercising their lawful regulatory oversight of intrastate cellular service rates, even when to do so would further the policy goals of the Budget Act. Such a wooden, unduly narrow construction of the statute not only is plainly contrary to its express terms and the legislative history underlying it, but it also thwarts the very policies which Congress is seeking to promote. The carriers' statutory construction is simply baseless.

In enacting the Budget Act amendments to the Communications Act, Congress did not abrogate the dual regulatory scheme of the Communications Act or vest exclusive authority over the charges for cellular and other wireless services with the FCC. To the contrary, Congress expressly preserved the dual scheme by recognizing that states were uniquely situated to evaluate markets for local and intrastate services to determine whether market forces in particular markets are adequate to protect consumers from paying unjust and unreasonable rates for local services.

Section 332(c)(3) is an expression of Congress' recognition of the important role which states may continue to play in furthering the transition to competition in wireless markets not yet sufficiently competitive to produce just and reasonable rates, which consumers deserve for wireless services. Specifically, Section 332(c)(3)(A) provides in pertinent part that, notwithstanding the preemptive language of that section, "a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that---

> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;

Congress then said that "if the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory." (emphasis added)

After prescribing the applicable standard which states must meet, Section 332(c)(3)(A) then defines the FCC's role with respect to the states. Specifically, Congress expressly provided that the FCC's role is to review whether a petitioning state has satisfied the standard set forth in Section 332(c)(3)(A). Congress then provided that if such state satisfies the standard, then the FCC must permit the state to exercise whatever authority it has under state law, for a period of time deemed necessary by

the FCC. Congress thus intended to preserve the dual regulatory scheme of the Communications Act in those circumstances where the state has satisfied the standard set forth in Section 332(c)(3)(A).[126]

Section 332(c)(3)(B) expressly references Section 332(c)(3)(A) and must necessarily be read in the context of the latter section. Specifically, Section 332(c)(3)(B) provides in pertinent part:

> (B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after the date of enactment of the Omnibus Budget Reconciliation Act of 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. (emphasis added)

Congress then said, as it did in Section 332(c)(3)(A), that the FCC must grant such petition if the "State satisfies the showing required under subparagraph (A)(i) or (A)(ii) above."

Continuing, in the language of Section 332(c)(3)(A), Congress then said in Section 332(c)(3)(B) that "[i]f the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to

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126. Under the Communications Act, Congress left it to the States to exercise regulatory oversight of intrastate charges. Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355 (1986).

ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory." (emphasis added)

Congress finally provided that after a reasonable period of time any interested party "may petition the Commission for an order that the exercise of authority by a State pursuant to [Section 332(c)(3)(B)] is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable." (emphasis added)

Taken together, Sections 332(c)(3)(A) and (B) demonstrate that Congress intended to allow states to seek either to obtain or to retain authority under state law over the charges for commercial mobile services. In neither case did Congress say, let alone suggest, that a state must propose a particular set of state regulations in seeking to obtain authority under Section 332(c)(3)(A), or that a state must continue to adhere to the particular set of regulations already in place as of June 1, 1993 in seeking to retain authority under state law pursuant to section 332(c)(3)(B).

Ignoring all of the above, the carriers nevertheless selectively interpret the phrase in Section 332(c)(3)(B) -- "[i]f a State files such a petition the State's existing regulation shall ... remain in effect until the Commission completes all action ... " -- as evidence that Congress meant only to allow states to grandfather the precise set of regulations in effect as of June 1, 1993. Yet when the phrase is read in the entire context of Section 332(c)(3), there can be no doubt that Congress intended to grandfather existing state authority, not a set of

regulations locked into place as of June 1, 1993, over commercial mobile service rates.[127]

Moreover, the legislative history of Section 332(c)(3) confirms congressional intent to define the circumstances under which state authority, not specific state regulations, is retained. In the House Conference Report No. 103-213, reprinted in 1993 U.S. Code Cong. And Admin. News ("U.S.C.C.A.N.") 1182, Congress clarified the grandfather provision of Section 332(c)(3)(B) by first explaining the intent of the Senate Amendment as follows:

> Section 332(c)(3)(C) [later codified as Section 332(c)(3)(B)] of the Senate Amendment is a 'grandfathering' provision that permits states that regulate the rates for any commercial mobile services as of June 1, 1993 to continue to exercise such authority until the Commission issues a final order in response to a petition filed by the State requesting that the State be authorized to continue exercising authority over such rates. ... Section 332(c)(3)(D) of the Senate Amendment permits any interested party to petition the Commission, after a reasonable period of time ... for an order that the State authority to regulated [sic] rates is no longer necessary. (emphasis added)

Congress then went on to explain that Section 332(c)(3)(B) is intended:

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127. No less than three times in Section 332(c)(3)(B), Congress refers to a state's exercise of "authority" over commercial mobile service rates. Such reference to state "authority" is consistent with its repeated references to state "authority" in Section 332(c)(3)(A). Placed in its proper context, Congress' use of the term regulation in Section 332(c)(3)(B) is simply a shorthand reference to regulatory authority.